

EXHIBIT A

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

- - -
HONORABLE CHRISTINA A. SNYDER
UNITED STATES DISTRICT JUDGE PRESIDING
- - -

SECURITIES AND EXCHANGE)
COMMISSION,)
)
PLAINTIFF,)
) CASE NO.:
VS.) CV 21-2927-CAS
)
ZACHARY J. HORWITZ, ET AL.,)
)
DEFENDANT.)
_____)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MONDAY, OCTOBER 30, 2023

LOS ANGELES, CALIFORNIA

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INDEX

PROCEEDING	PAGE
RECEIVER'S MOTION FOR	4
REVIEW OF MAGISTRATE JUDGE'S	
ORDER	

1 LOS ANGELES, CALIFORNIA; MONDAY, OCTOBER 30, 2023; 10:03 A.M.

2 - - -

3 THE CLERK: Calling Calendar Item No. 1.

4 Case No. CV 21-2927.

5 Securities and Exchange Commission versus Zachary
6 Horwitz, et al.

7 Counsel, please state your appearances.

8 MS. PHELPS: Good morning, Your Honor. Kathy
9 Phelps on behalf of the receiver and the receiver is also
10 here present today.

11 MR. ABASCAL: Good morning, Your Honor. Manny
12 Abascal on behalf of City National Bank and I also have Josh
13 Hamilton in my office.

14 THE COURT: Good morning.

15 All right. I know that I have upset the apple cart
16 here so I suppose, Mr. Abascal, you have the laboring oar for
17 the day, uh, and I assume you wish to be heard.

18 MR. ABASCAL: Yes, Your Honor.

19 Thank you very much for that.

20 I would like to address four issues with the
21 Court's tentative, and thank you very much, Your Honor, for
22 sending the tentative in advance. My main concern with the
23 tentative is the Court and the receiver are adopting a
24 definition of claim that is not in the agreement and that the
25 receiver itself has not used in this case. The receiver in

1 this case has defined claim to include unasserted claims, and
2 I'll go through that in a minute.

3 My second concern is that the Court is not
4 interpreting the actual language in the 2020 agreement. The
5 2020 agreement, uh, states that any dispute is a problem or
6 concern and one that involves the combined claims of all the
7 parties. That's the actual language. It doesn't require a
8 claim.

9 It says a dispute, problem or concern that involves
10 the combined claims of all the parties. And here in this
11 case as the Court noted, this is a case where the combined
12 claims of all the parties are in the hundreds of millions of
13 dollars.

14 The third concern I have, and I'll go through each
15 of these in a little bit more detail, Your Honor, with the
16 Court's patience is the Court is adopting an argument that
17 wasn't clearly made to the magistrate judge and it can't be
18 clearly erroneous for the magistrate to not have adopted a
19 ruling that was never asked for.

20 Before the magistrate, uh, the receiver had argued
21 that none of the agreements applied and also argued that the
22 2012 and 2007 agreements applied. In their brief before the
23 magistrate, they said no notice had ever been provided of any
24 of the updates so the only ones that were applicable were the
25 2012 and the 2007 agreement.

1 And then finally, Your Honor, my last concern, uh,
2 which the first I'll start with in detail is that the I
3 believe standard of review is not properly being applied in
4 the tentative both as to how to review a magistrate judge's
5 order and under the FAA. So those are my main points and
6 then I'll start with the standard of review.

7 Um, under the Salinas case and other established
8 case law, a magistrate judge's ruling is reviewed for clear
9 error which in Salinas was defined as, um, there a ruling can
10 be clearly erroneous if there is -- cannot be clearly
11 erroneous if there's no 9th Circuit authority on point. If
12 the magistrate judge's account of the evidence is plausible
13 in light of the record, then the district court may not
14 reverse it even if it would have weighed the evidence
15 differently. I think that's what the --

16 THE COURT: Let me stop you there. If the
17 magistrate judge is essentially confused or misled by the
18 arguments of the parties which I think was part of the
19 problem here, does that rule apply?

20 MR. ABASCAL: Um, I think if the magistrate judge's
21 ruling, uh, was plausible, then that rule does apply. I
22 don't see how the magistrate judge was misled by the -- by
23 the parties, Your Honor, and I would like to hear more about
24 that.

25 THE COURT: Well, no, here's my problem. I'm not

1 suggesting that your side did it. Your side made all the
2 arguments. I do think the receiver, uh, did not emphasize
3 sufficiently the fact that I had issued the order permitting
4 investigation. And I think the crux in the problem here is
5 does -- is that order trumped by the agreement.

6 And as you can read, I think that there's not a
7 claim yet and because there's not a claim, then I don't think
8 the agreement comes into play at this point in time. It may
9 at some future time when there's a claim, but at this point
10 in time when the receiver is attempting to conduct an
11 investigation pursuant to powers given to it by the Court
12 expressly, I don't think that's barred.

13 It's really that simple. There are lots of fancy
14 arguments that have been made, but at the end of the day,
15 that's really the core of my ruling which is we don't have a
16 claim yet. And, um, I know you believe there's a claim under
17 the agreement and that the agreement now, uh, is effective,
18 but even then I don't necessarily agree because we're talking
19 about the 2020 agreement not a later agreement and I think it
20 has, um, it doesn't constrain the receiver as you argue.

21 MR. ABASCAL: Well, Your Honor, let me address that
22 concern and let me go straight to the heart of it. There are
23 11 cases in five circuits that have all said that a receiver
24 is bound by the agreements and stands in the shoes of the
25 entity, the receivership entity. So the Court's order cannot

1 change the agreements. There's no situation where the
2 Court's order can trump or reverse an agreement.

3 The receiver is bound by the agreements and the
4 Court's order can define the receiver's powers, but it can't
5 exceed those beyond what is in the agreement. That's very
6 clear from the O'Melveny case, um, from all the 11 cases that
7 we cite in our brief. So there isn't an issue where the
8 Court -- the agreement is trumping. The Court is bound by
9 those agreements.

10 THE COURT: That's where we differ. I don't think
11 that the events have occurred to cause the agreements to come
12 into play yet. Um, if you don't have a claim, uh, and that's
13 really where we disagree whether there's a claim or not, I
14 don't think the agreement comes into play. So I am not
15 saying that the agreements can't in some circumstances trump
16 the receiver's powers, but what I am saying is that the Court
17 has an obligation to construe and interpret the agreement.

18 And as I interpret the agreement, essentially, we
19 are not up to the claim point yet and we don't get to the
20 arguments that you're making, although down the road if there
21 is a claim against the bank, you may well be able to make the
22 claims.

23 MR. ABASCAL: Well, let me then address that. The
24 agreement actually says and here is the language, if you have
25 a problem or concern about your account, please contact us

1 immediately. If you and we are not able to resolve the
2 dispute quickly and informally, then you agree the dispute
3 will resolve using the procedures set below. So dispute is
4 defined as a problem or concern. The agreement does not
5 define it as a filed lawsuit. It does not define it as an
6 asserted claim. It defines any problem or concern which we
7 clearly have here. We have a subpoena that we believe is not
8 issued with any authority. So that's the definition of
9 dispute.

10 Now, let me get to the definition of claim. The
11 agreement doesn't say there has to be a filed claim. It says
12 a dispute which is a problem or concern that involves the
13 combined claims of all parties totalling \$250,000 must go to
14 judicial reference. It says involves the combined claims of
15 all the parties. It doesn't require a filed claim. And
16 clearly here I think with the Horwitz matter, we have the
17 combined claims of all the parties are in the hundreds of
18 millions.

19 Now, let me go to the heart of it. The claim, the
20 word claim which the Court is focused on, the receiver in
21 this case has defined claim to be an unasserted claim. If
22 you look at ECF 218 that is a settlement agreement. It's a
23 settlement agreement with a party called Crookston. And in
24 that settlement agreement on page 2, the receiver says that
25 they have claims against Crookston and they're settling those

1 claims.

2 There was no filed lawsuit against Crookston. But
3 in this settlement agreement, the receiver says quote, "a
4 defined term, the receiver's claims." And those claims are
5 settled for almost \$4 million and those claims are released.
6 So the receiver itself has defined claim to include an
7 unasserted claim in this very litigation not once, but twice.

8 In ECF 235 there is a settlement agreement with
9 JJMT that was for \$9 million. Settlement agreement signed by
10 this receiver, drafted by this receiver, and on page 2 of
11 that settlement agreement, this receiver says that they have
12 claims against JJMT. There was no filed lawsuit by the
13 receiver against JJMT. There was no asserted claim by JJMT,
14 but the receiver herself defined the word claims as including
15 the unasserted claims against JJMT. And those claims were
16 settled and then released for \$9 million.

17 So it cannot be clearly erroneous for the Court to
18 adopt the same definition as claims as the receiver is using
19 in this case in their settlement agreements. So I note that
20 to begin with, again, the agreements do not use the word
21 claim. There's no interpretation of any problem or concern
22 that requires a filed claim. And the actual language is
23 involving the combined claims of all the parties.

24 So on that alone, I think there is no requirement
25 in the agreement that the dispute resolution and ADR

1 provisions require a filed claim. If the receiver wants to
2 pursue the subpoena, they can try to pursue it in judicial
3 reference in California court. They can't under no
4 circumstance would any account holder be allowed to get
5 pre-filing federal court discovery under these agreements.

6 THE COURT: Yeah, I understand that, but what about
7 the receiver's investigatory powers? You're saying the rest
8 of the order that I issued way back when has no effect
9 because even though I gave the receiver investigatory powers,
10 it has none?

11 MR. ABASCAL: No, not at all. Your order for this
12 receiver expressly said that the receiver can pursue, um, an
13 investigation, litigation and arbitration and settlement. So
14 your order said that they can pursue all the remedies that
15 they're entitled to, but they're bound by the agreement. And
16 that's the holding of 11 cases again in five circuits.

17 In the McIntyre case in the Southern District of
18 New York a case against Lobe & Lobe, SEC receiver sought to
19 get a subpoena against Lobe & Lobe, uh, and the court quashed
20 the subpoena and the court said because under the agreements,
21 they weren't entitled to that discovery. And that was
22 essentially the same, uh, holding and rationale in the other
23 cases that we've cited in multiple different circuits.

24 So it's not undermining your order, Your Honor.
25 Your order allows the receiver to do what they're

1 contractually entitled to do, but the Court does not have the
2 power as been reflected in -- in multiple cases, um, to
3 overturn or allow the receiver to reject agreements. This is
4 not a bankruptcy receiver.

5 THE COURT: No, I understand that line of case law,
6 but I just don't think it's applicable here. I interrupted
7 you. Why don't you finish off, and then we'll hear from the
8 receiver.

9 MR. ABASCAL: Yeah. Let me go to, again, the
10 standard of review which I think is also, um, not being
11 applied accurately in the tentative ruling. The Coast Plaza
12 case is important. That case says that there's a strong
13 public policy in favor of arbitration. Uh, the general rule
14 that arbitration should be upheld unless it can be said with
15 assurance that an arbitration clause is not susceptible to an
16 interpretation covering the asserted dispute.

17 The burden is on the party to show, um, that's
18 opposing arbitration, that the agreement doesn't require it.
19 As the court said, if there's any reasonable doubt, that
20 doubt must be favored and resolved in favor of arbitration
21 and that implies to judicial reference as well. Any
22 reasonable doubt. And I think under that standard,
23 Your Honor, there is clearly reasonable doubt as to the
24 receiver's interpretation.

25 They're trying to import this notion of a filed

1 claim into this agreement when that language is not there.

2 It again says any problem or concern involving the combined
3 claims of all the parties.

4 I'll also note that the receiver cited a definition
5 from the Bankruptcy Code as applicable here, but even under
6 that definition, that definition covers unasserted claims.
7 Uh, the -- the Bankruptcy Code provision that they cite
8 includes a right to payment. Whether or not reduced to
9 judgment contingent, disputed and that's what we have here is
10 a receiver has a potential right to payment, um, and a
11 problem or dispute involving a potential right to payment.

12 So the receiver's interpretation that a claim must
13 mean an asserted claim is not compelled by any 9th Circuit
14 precedent and is not accurate beyond a reasonable doubt. And
15 therefore, Your Honor, I think applying the standard of
16 review both for the FAA and for a magistrate judge ruling,
17 the ruling should be upheld.

18 I'll note one other issue, Your Honor, um, two
19 other issues just real briefly and thank you for your
20 patience. One, again, the receiver didn't clearly articulate
21 that the 2020 agreement should apply before the magistrate.
22 They cited the 2007 agreement and the 2012 agreement. They
23 didn't clearly apply this one.

24 And then finally I'll say, Your Honor, that City
25 National Bank is not seeking any windfall here. Uh, what

1 we're seeking here is the application of the agreement. The
2 parties, the receiver stands in the shoes of Horwitz. The
3 parties had an agreement. It was the benefit of the bargain
4 and the ADR provision is that here clear benefit, a clear
5 provision and important term of that agreement and we're
6 seeking for that to be enforced.

7 Now, the receiver has remedies. They can go and
8 file a judicial reference. They can seek this subpoena in
9 judicial reference. They can, uh -- they have the remedies.
10 What they don't have under the agreement which the parties,
11 um, agreed to at the inception of this relationship, they
12 don't have the right to pre-filing federal court discovery.

13 Um, so the receiver is not without any remedies,
14 um, and this is clear from the case law I cited including the
15 Winkler case, Your Honor. And I know Winkler is the most
16 recent case which clearly says the ADR provisions apply to
17 the receiver. So with that Your Honor, I thank you.

18 THE COURT: Okay. Who will be speaking for the
19 receiver?

20 MS. PHELPS: I will be, Your Honor.

21 THE COURT: Okay, Ms. Phelps.

22 MS. PHELPS: Thank you, Your Honor.

23 This is a dispute that cuts directly to the duties
24 of the receiver and your authority and supervision over the
25 receiver. And the question I think, Your Honor, your

1 tentative is exactly right. The first question is what
2 contract applies, and the second question is does that
3 contract have applicable ADR provisions that have in fact
4 been triggered here.

5 And then, of course, even if there is such a
6 provision, should that apply to a federal equity receiver.
7 And I think that third question is one we don't even need to
8 get to today.

9 Um, I think that on the first question, Your Honor,
10 it is exactly right that the 2020 amendment applies and as I
11 hear counsel today, City National Bank's counsel, it appears
12 to me they have in fact conceded that the 2023 amendment
13 doesn't apply. And for that reason, there is no applicable
14 arbitration provision. At the hearing in front of the
15 magistrate, they were still very much well, it could be
16 either one, and today they seemed to have zeroed in on
17 judicial reference.

18 So I think that that in and of itself demonstrates,
19 Your Honor, that we really need to decide what contract
20 applies. And I think that your tentative is correct and it
21 appears to me correct, uh, that counsel now understands that
22 and that we are talking about the 2020 amendment. Um, I -- I
23 disagree vehemently that this was not raised. It was all
24 that we talked about in the lower court what contract
25 applies.

1 City National Bank threw all of the contracts in
2 front of the court and then argued repeatedly that those
3 contracts were subject to amendment and were amended along
4 the way. The most recent one is the 2020 amendment. I don't
5 think that there's any dispute there at all. So then we move
6 to the question of well, what does that 2020 agreement say.
7 It does not define dispute nor does it define claim.

8 What it does do is give it a very specific
9 explanation of what is required to trigger it. And there are
10 three things and it is specifically, a dispute regarding a
11 claim that involves \$250,000 or more. It's very clear. It
12 is their own contract. Now, there has been no argument made,
13 um, contrary to what I just heard counsel say that the
14 receiver has said that there has to have actually been a
15 claim filed.

16 No, a claim is right to payment and listening to
17 counsel, I could almost hear him get a little tangled up in
18 that argument because the receiver had right to payment
19 against the parties that she settled with. She asserted
20 those rights to payment. She entered into settlement
21 discussions and she settled them. That hasn't happened here.
22 We don't know yet if the receiver is going to assert a right
23 to payment because we need to discovery first.

24 So under the very, very language of -- very
25 specific language of City National Bank's own contract, they

1 haven't met those terms. And I will say that we use the
2 definition, um, from the Bankruptcy Code which is very
3 specifically a right to payment. It doesn't say anywhere
4 that an actual lawsuit has to have been filed. Here, we
5 don't even have a claim that's been asserted yet.

6 Um, but the Bankruptcy Code has been cited because
7 Your Honor, the Central District of California local rules do
8 ask the Court to administer a receivership case as closely to
9 a bankruptcy case as possible. It is a very robust and
10 common definition to claim. That definition is a right to
11 payment. And here the receiver has not asserted a right to
12 payment. She has simply served an investigatory subpoena.
13 That is all that we are talking about.

14 And as the Court has noted, you have granted her
15 that authority. She has served 9 or 10 subpoenas in this
16 case without issue. Parties, third parties, have produced
17 those documents and so that has just been a nonissue in this
18 case. We do understand that City National Bank does not want
19 to produce records, um, but we do believe that they are duty
20 bound to do so pursuant to the terms of the subpoena.

21 On the question of the standard of review, um,
22 counsel has cited a case saying there's a policy in favor of
23 arbitration, but then right after that noted the exception
24 that there has to be an arbitration clause that applies.
25 There isn't here for all of the reasons that we discussed.

1 We've now zeroed in on what the contract is, we've zeroed in
2 on what the trigger language is. Your Honor, I think in your
3 tentative said exactly it right that it hasn't happened yet
4 and so this is where we are.

5 At bottom, Your Honor, this case is, uh, it's your
6 case. You're in charge of it. You have appointed the
7 receiver. Congress has called upon you to handle this case
8 in an equitable manner and City National Bank is asking you
9 to delegate important responsibilities and an important issue
10 to a nonjudicial officer. You know, the judicial reference
11 process will divest the Court of its supervisory role over
12 this proceeding, and we don't think that's appropriate at
13 this junction for all the reasons that I stated.

14 Congress has given you the authority and the power
15 to make sure that this matter is handled in an equitable
16 fashion. We have a case here where City National Bank wants
17 the receiver who is not a party to be bound by an agreement
18 that fraudsters made as part of their scheme and there's
19 nothing right or equitable about that. But, again,
20 Your Honor, I don't even think we need to get there.

21 Obviously, I have a lot of argument on that topic,
22 but I think that the Court's tentative ruling that the 2020
23 agreement is the one applies and the language in that 2020
24 agreement regarding ADR has not yet been triggered. And for
25 all of those reasons, Your Honor, we think that the Court's

1 tentative got it exactly right.

2 THE COURT: Okay. Mr. Abascal, do you have
3 anything to say in response?

4 MR. ABASCAL: Yes, briefly, Your Honor.

5 I don't think the receiver has addressed the key
6 issues that I've identified. First, Your Honor, the
7 definition of claim. We're asking the Court to apply the
8 same definition of claim that the receiver has used in the
9 JJMT agreement and in the Crookston agreement. In those
10 agreements the receiver did not file a lawsuit, only
11 conducted an investigation and settled the claim, uh, which
12 they define as receiver's claims.

13 So they're defining claim as an unasserted claim.
14 And it cannot be clearly erroneous to interpret our agreement
15 as using the definition of claim that the receiver itself has
16 used in this case. I'll also note that the JJMT agreement
17 also defines the word dispute and it defines it broadly to
18 include the disputes that they had with JJMT which, again,
19 did not involve a filed claim.

20 Now, that case doesn't even involve our agreement.
21 Our agreement, again, the exact language which was never
22 quoted by the receiver in their reply is that a dispute is
23 any problem or concern that, and then it goes on to say for
24 judicial reference that involves the combined claims of all
25 the parties. So this dispute that we have problem or concern

1 clearly involves a situation where the combined claims of all
2 the parties are hundreds of millions of dollars here.

3 I'll also note the receiver is essentially asking
4 this Court to not follow the Winkler case, not follow the
5 Sharpe case, not follow FDIC versus O'Melveny. Congress has
6 not given the Court or an equity receiver the power to reject
7 agreements. That is clearly articulated in five different
8 circuits in 11 different cases. This court does not have the
9 power to abrogate existing agreements.

10 The receiver steps in the shoes of Horwitz and is
11 bound by those agreements. And none of the agreements --
12 what the receiver essentially argues don't let me bound by
13 these agreements. I shouldn't be bound by them. That has
14 been rejected already multiple times including in this
15 circuit as recently as Winkler.

16 Again, Your Honor, I will say there is no
17 interpretation of the City National Bank agreements that
18 would allow federal court discovery. The receiver has
19 remedies. They can seek the subpoena elsewhere. They can
20 file something, a lawsuit in judicial reference and this
21 Court would continue to supervise that under its order. The
22 Court's order said that the receiver can proceed with
23 litigation, investigation or arbitration.

24 And so we're just asking the Court to adopt and
25 follow the agreement that are bound by the parties to follow

1 the Winkler case, Sharpe, FDIC versus O'Melveny that says
2 this receiver is bound by the agreements signed by Horwitz
3 and those agreements, as I noted in the language, have very
4 broad language that would include any problem or concern that
5 has to be put into judicial reference. And this notion of
6 claims, we're asking the Court just to apply the same
7 definition that the receiver itself applied.

8 THE COURT: Okay. I hear you. Um, I'm gonna take
9 the matter under submission and consider what Mr. Abascal
10 said. I am currently disinclined to change my ruling, but
11 let me take a further look at his arguments and I will have
12 something for you sooner rather than later.

13 Thank you, everybody.

14 THE CLERK: Thank you, counsel.

15 (Proceedings were concluded at 10:31 a.m.)
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CERTIFICATE OF REPORTER

COUNTY OF LOS ANGELES)
) SS.
STATE OF CALIFORNIA)

I, LAURA ELIAS, OFFICIAL REPORTER, IN AND FOR THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, DO HEREBY CERTIFY THAT I REPORTED, STENOGRAPHICALLY, THE FOREGOING PROCEEDINGS AT THE TIME AND PLACE HEREINBEFORE SET FORTH; THAT THE SAME WAS THEREAFTER REDUCED TO TYPEWRITTEN FORM BY MEANS OF COMPUTER-AIDED TRANSCRIPTION; AND I DO FURTHER CERTIFY THAT THIS IS A TRUE AND CORRECT TRANSCRIPTION OF MY STENOGRAPHIC NOTES.

DATE: NOVEMBER 6, 2023

/s/ LAURA MILLER ELIAS

LAURA MILLER ELIAS, CSR 10019
FEDERAL OFFICIAL COURT REPORTER